

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 311 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and  
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

RAJU @ RAMJI KARSAN

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Appearance:

MR K.C.SHAH, ADDL.PUBLIC PROSECUTOR for Petitioner  
MR KR RAVAL for Respondent

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CORAM : MR.JUSTICE J.N.BHATT and  
MR.JUSTICE A.L.DAVE

Date of decision: 16/09/98

ORAL JUDGEMENT Per Bhatt,J.

What a travesty of majesty of justice ! will be the only startling feeling to one who not only entertains or hears this appeal but even an ordinary person who reads the papers.The gruesome and ghastly murder of a child baby Ratu aged about 3 to 4 years became the victim of kidnapping, rape and finally murdered by strangulation whose dead body was traced from bushes in the railway-yard at Gandhidham.The respondent accused came to be acquitted and after having dispassionately and elaborately

examined the testimonial collections and the documentary evidence, we have also to painfully but dutifully raise our hands in helplessness from converting acquittal into conviction, keeping in mind the statutory imperatives mandated by the Criminal Jurisprudence.

By filing this acquittal appeal under Section 378 of the Code of Criminal Procedure, 1973 ('the Code') against the order of acquittal recorded by the learned Sessions Judge, Kutch at Bhuj in Sessions case No. 85 of 1989, the appellant-State has vociferously and seriously attempted to save the situation which could have been done by the same prosecuting agency and the investigating authority if it had remained little less indifferent in strategy during the course of the trial. Ofcourse, verdict to be pronounced is a job of the court but the investigation and prosecuting agency is obliged and as such is bound to thoroughly investigate so as to detect the crime and the criminal and thereafter equally strong obligation on the part of it to place before the court and prove to the satisfaction of the court, which unfortunately in the present case, has not been done. Which ought to have been done has not been done by the prosecution. Which is done was not, to an extent, necessary to be done..Merely placing on record some documents without taking care to prove them and that too in a case of capital charge of murder, rape, kidnapping and that too of a small baby of tender age between 3 to 4 years, is rather unhappy situation and not at all sufficient. An impression which we have gathered in the course of hearing of this appeal is not only shocking but startling and we cannot resist the temptation of placing the same on record not only for our satisfaction but also for some guidance, care and caution in future in such cases by the authorities involved, if at all they are so minded to think it. Apart from dynamics of Criminal Justice delivery system, larger interest of justice assumes paramount and vital role to which again, we are sorry to say in this matter was not done by one all concerned, except the defence counsel. The authorities have remained oblivious, unmindful, indifferent and apathetic. The trial of heinous crime when gets culminated into acquittal on account of want of required procedural care by the prosecuting agency and to an extent, the concerned court, it is really not a matter of unbearable pain but it is also a heart-stealing, with due respect to one and all concerned.

The short history may be traced which has led the State to file this acquittal appeal. The respondent is the original accused who came to be charged for having committed offences punishable under Sections 363, 376, 302 and 201 of the IPC in Sessions case No. 85 of 1989 by the learned Sessions Judge, Kutch at Bhuj on 5.5.1990. The charge came to be framed upon the facts alleged by the prosecution which need narration at this juncture. The prosecution story goes that in between the period from 15.6.1989

at about 6.30p.m.to 18.6.1989 at 4.30 p.m. the respondent-accused committed an act of murder by throttling the deceased Baby Ratu in bushes near the railway yard of Gandhidham railway station,after kidnapping her and thereafter raping her. The incident commenced on 29.5.1989 when deceased Ratu ,daughter of Raju alias Ranchhod was taken away from his legal guardianship by alluring her and thereafter committed rape on her between 15.6.1989 and 18.6.1989 and to silence the victim, committed her murder by throttling and again to screen the offence, threw the dead body in bushes so as to cause disappearance of the evidence of the offence.

The complaint came to be recorded and investigation started and upon completion of the investigation, the charge sheet followed and upon committal of the accused to the sessions court, the accused came to be charged for the aforesaid offences.

In order to substantiate and fortify the charges against the accused, the prosecution placed reliance on 26 prosecution witnesses and also placed reliance on the medical evidence, FIR, medical case papers and other documents to which reference will be made by us as and when required,at appropriate stage hereinafter.

Upon examination and evaluation of the prosecution evidence, the learned Sessions Judge found the accused not guilty and passed the acquittal order which is precisely in focus before us in this appeal.

The trial court found that death of deceased Ratu was culpable homicide amounting to murder due to throttling. However,the trial court also raised its hands in helplessness by holding that the prosecution has not been able to compaginate the accused with the complicity of murder of baby Ratu.This part of the impugned judgment is seriously and vehemently criticised by the learned Addl.P.P.who has contended that the impugned order of acquittal is required to be interfered with and converted into conviction exercising our powers under Section 378 of the Code mainly on the following grounds;

(i) that the identity of the accused and Baby Ratu is proved by the prosecution;

(ii) In view of the evidence of the prosecution, the accused had taken away baby Ratu from the hospital against medical advice by signing the medical papers and making endorsement of having received the custody of baby Ratu who was got admitted by him on 12.6.1989 and,therefore,the trial court ought to have held that it was the accused and nobody else who is the author of crime;

(iii) that the impugned judgment and order of acquittal of the trial court is not only unjust,unreasonable but is perverse and the accused is liable for conviction and sentence for the offences he was charged with.

The aforesaid submissions are seriously countenanced by the learned advocate Mr.Raval who was appointed by this court by way of legal aid for the defence of the accused. He has thus fully supported the impugned order of acquittal. It is also canvassed before us by him that the jurisdictional scope in acquittal appeal under Section 378 is not as wide as in conviction appeal.

In support of the first contention, the learned Addl.P.P. has submitted before us that identity of deceased Ratu is established by the evidence of her natural father Raju alias Ranchhod,P.W. 18,examined at exh.68 who has identified the photographs of Ratu which were taken before post mortem in the hospital.The photographs are relied on by the prosecution which are not proved. The photographer is not examined. Negatives are not produced. However, on the basis of mere production of photographs which were shown to the father in course of his evidence before the court, identity is sought to be established.

Again, reliance is also placed on the medical evidence of Dr. M.D.Buch, P.W. 7, exh. 15 and it is submitted that the doctor has testified that the accused had taken deceased Ratu against the medical advice. It is the prosecution case that the accused had taken away deceased Ratu against medical advice on 15.6.1989 by making endorsement and signing the medical case papers. We may, at this stage ,point out the following apparent, obvious and important discrepancies emerging from the evidence of Dr.Buch which undoubtedly do not lend reinforcement to the prosecution case to prove the identity and that the accused had taken away baby Ratu against the medical advice from the hospital on 15.6.1989 and to prove the nexus between the incident occurred thereafter on 18.6.1989, the date on which the dead body of unfortunate baby was traced from bushes near the railway yard at Gandhidham;

(I) Dr Buch examined at exh.9 firstly does not state that the accused had taken away deceased Ratu by signing the medical case papers and placing endorsement thereon;

(ii) He has identified the accused for the first time in the course of his evidence and presumably upon assumption in view of the endorsement and the signature purported to have been made by the accused ,which is not legally proved. Neither the said doctor had given medical

treatment to the deceased nor he was present when discharge was permitted.

(iii) It is very clear from the testimony of the investigating officer that Dr Buch had not stated in his statement taken by him under Section 162 of the Code that the accused had come to the hospital.

(iv) In view of the evidence of Dr Buch, the prosecution is not in a position to prove the identify of baby Ratu as well as the accused.

(iv) The photographs ,for the reasons best known to the prosecution,have not been proved as per the provisions of the Evidence Act. Without legal proof of photographs, reliance was placed by the prosecution on four prototrophs of deceased Ratu to establish the identity through them.In the circumstances,the view taken by the trial court that identify of deceased is not established , cannot be said to be a view which cannot be conceived from the evaluation of evidence.

(v) The endorsement purported to have been made by the accused while taking discharge of baby Ratu from the hospital and the signature are not proved. The medical case papers are produced by the prosecution in support of its case but the later part and portion of the medical case papers below which the accused is alleged to have signed and put endorsement while taking custody of baby Ratu upon discharge against medical evidence, have not been proved. The first part of the medical case papers is also given two exhibit numbers as it came to be proved in course of two witnesses. Endorsement of 15.6.1989 in the later part of medical case papers is not proved. Nobody has testified that the accused had signed or he had seen the accused signing.Therefore, it becomes clear that endorsement and the signature purported to have been made by the accused have not been proved.

Despite this clear cut factual scenario, it was contended before us that reliance should be placed on the report of the finger print expert under Section 45 of the Evidence Act. In order to constitute permissible medical evidence of the disputed writing or signature, it must be shown that the disputed signature was purported to have been made by the accused at the point of denying it. Since this is not established, the report of hand writing expert under Section 45 of the Evidence Act does not come to the rescue of the prosecution to prove the identity and the interested evidence given by the accused of the deceased. However, relying on provisions of Section 73 of the Evidence Act, it was contended that the court should also consider after

comparing the admitted signature with the disputed signature. Insofar as proposition laid down under Section 73 is concerned, there can hardly be any controversy. The court is empowered to compare signature, writing with other admitted or proved writing. In order to ascertain whether a signature, is that of a person by whom it purports to have been written or made, any signature, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved although the signature, writing or seal has not been produced or proved for any other purpose. The clear implication of provisions of Section 73 of the Evidence Act is to enable the court to compare handwriting or signature in the event of disputed writing with the admitted writing. So, irrespective of opinion of the handwriting expert, the court can compare the admitting writing with the disputed writing and consider the merits of the case. It may be stated at this juncture that exercise of comparison permissible for court under Section 73 of the Evidence Act is not always determinative or decisive factor. Ordinarily, as per the settled proposition of law, the provisions of Sections 45 and 73 of the Evidence Act are complementary to each other. When evidence of the handwriting expert is placed on record, ordinarily, the court would not be inclined to discard it by resorting to provisions of Section 73. The court has to bear in mind, while exercising powers under Section 73 of the Evidence Act, the fundamental principles of Criminal Jurisprudence. At times, it is held to be a weak type of evidence which would not constitute a launching pad for successful legal missile to be used against the accused. Therefore, in our opinion, the submission of the learned Addl. P.P. on this score does not take the prosecution case any further.

Since the prosecution has not succeeded in establishing the identity of the accused as well as the deceased, the other points need not be articulated in great details. We would, however, like to point out the following points which run counter to the case of prosecution and in favour of the defence:

(1) The conduct of the accused before and after the incident is significant in resolving the controversy along with other points. The accused had taken baby Ratu to the hospital as she had sustained injuries and got her admitted for medical treatment on 12.6.1989. Initially, the deceased had sustained injuries and according to the defence version, she fell down from running swing. Therefore, in order to afford her medical aid, she was shifted to Gandhidham hospital from where, under medical advice, she was taken to the Civil Hospital at Bhuj which is about 65 Kms. from Gandhidham. This conduct of the accused is compatible and in consonance with the defence of his innocence. A person who takes care of injured infant like the daughter and strives for giving medical treatment and takes her from one hospital to

another ,indicates that he was inquisitive for the life of the infant and not at all for her death. It is not in dispute that deceased Ratu was allegedly taken out of the guardianship of her father on 29.5.1989 and until 15.6.1989,when the deceased was reported to be discharged against medical advice, nothing had happened during that period which would even point at the guilt of the accused. Ofcourse, according to the prosecution case, the accused took the deceased against medical advice from Bhuj hospital on 15.6.1989 by making endorsement in the medical case papers and signing it, which has not been proved by the prosecution.Be that as it may, even if it is presumed to be so, then also, it would be difficult to infer straightaway from the past conduct that discharge was sought or obtained by the accused to do away with minor deceased Ratu. The dead body was found concealed in bushes near the railway yard at Gandhidham on 18.6.1989 and it appears from the record that the death had occurred atleast within forty-eight hours , as per the medical evidence. If this version of the prosecution that the accused got her discharged,even if it is held to be correct, then also, there is no reasonable basis for inference that he got her discharged for taking her life by throttling after ravishing her.Therefore,in our opinion, the conduct of the accused points at his innocence and not complicity.

(2) Although motive is not imperative to be established by the prosecution for commission of crime,it assumes wide significance in case of circumstantial evidence,like the one on hand.The prosecution has even not alleged any motive for commission of such crime.This aspect also goes diametrically opposite to the version of the prosecution.

(3) Moreover, it is a settled proposition of law that when direct evidence of complicity is not available, conviction can be founded upon circumstantial evidence and the chain of circumstances should be so complete as to transfix the culpability of the accused without any doubt. In the present case, even if identity is held to be proved and also the allegation that the accused got her discharged from the hospital against the medical advice on 15.6.1989 is presumed to be correct, then also, there are missing links and that too in the background of want of motive. In order to succeed in case of circumstantial evidence, the prosecution must prove the guilt of the accused by leading cogent, convincing, coherent and complete chain of circumstances. The aforesaid circumstances would only constitute part of the whole chain and not full chain, as required under law.

(4) Again, one important aspect to which we cannot remain oblivious of, is the settled proposition of law with regard to powers of the appellate court under Section 378 of the Code while dealing with merits of acquittal appeal. It cannot be

gainsaid,in view of the settled proposition of law, that ordinarily, the appellate court should not substitute its views in place of views of the trial court merely because a better and different view is perceivable or conceivable.It cannot be held even for a moment , in light of the entire conspectus of the facts of the present case, that the view taken by the trial court is totally impossible or perverse or radiating an imprint of prejudice resulting into miscarriage of justice.

(5) We are tempted to mention one more aspect which also creates a strong impediment in the way of the prosecution to succeed i.e. with regard to the conduct of the natural father of the deceased.The father of the deceased P.W.18 Raju alias Ranchhod,exh.62. Apart from the fact that it has not inspired our confidence, his conduct for long spell of 20 days in not letting know the police or other responsible persons is not only suspicious but is dubious. He has unfortunately allowed us to form an impression that he did not act in a natural and reasonable way , the father of an infant of 4 years would immediately re-act. Not only that the conduct of the accused is consistent with his innocence but the conduct of the father of the deceased is also creating cloud of doubt and obviously, benefit thereof should go to the accused.

(6) Incidentally, we may also point out that the complaint at exh.81 recorded by the investigating officer during the course of investigation with regard to suspicious death of baby Ratu and more so, when allegedly the father of the deceased had lodged the complaint before Kosamba police is undoubtedly hit by the provisions of Section 162 of the Code. Therefore,in our opinion, FIR exh.81 as such cannot be characterised as FIR as contemplated by Section 154 of the Code as it was recorded during the course of investigating and therefore, is running in the teeth of Section 162.We have,therefore, no option but to discard FIR,exh. 81 as FIR under Section 154 of the Code.

We may place on record ,before we conclude our verdict ,that we did think of one more alternative provided in Section 386 (a) of the Code which empowers the appellate court for re-trial of the accused in the peculiar facts and circumstances of the case. Initially , we thought it expeditious in view of the fact that -

(i) the photographs,though produced, not proved;

(ii) the complaint lodged by the father P.W.8,exh.62 -Raju alias Ranchhod ,not brought on record ,though in our opinion, it was, in clear terms, an FIR under Section 154 of the Code;

(iii) failing to establish part of the medical case papers below which, allegedly the accused having put his

endorsement of having taken minor baby Ratu along with him , by way of discharge against medical advice and having put his signature,being not proved in terms of the Evidence Act . Without bringing material on record, it was not possible to prove .

Therefore, these aspects prompted us to think of permissible option under Section 386 which prescribes powers of the appellate court .Nonetheless, we desist from resorting to provisions of Section 386 (a) of the Code for remand and re-trial and to afford to the prosecution an opportunity to prove the documents which are already placed on record but which have not been proved. Since the offence in focus is not only heinous but macabre,for the reason that time lag in between the alleged commission of offence and filing of this appeal is almost a decade,whether the witnesses to prove the photographs and remaining medical case papers would be available or not,whether the complaint firstly lodged by the father of the deceased can be proved after a spell of a decade engaged our attention seriously and restrained us from exercising option conferred on the appellate court under Section 386 (a) of the Code. It must also be remembered that the accused has undergone the agony and difficulty in facing serious charges of rape, murder and has passed through long legal conduit pipes of procedure almost for a spell of decade. With the result, throwing into scale the expediency of resorting to provisions of Section 386 (a) of the Code and the advisability of directing the accused for re-trial bearing in mind the fundamental principles of Criminal Jurisprudence , we opted for putting an end to the chapter which is nothing but a dead horse now insofar as the offence in the present case is concerned.

After having considered the entire conspectus of testimonial collections and documentary evidence and having heard rigorous and vigorous rival submissions, we are left with no alternative but to raise our hands in helplessness and to confirm the impugned acquittal judgment and order in view of the aforesaid discussion and peculiar facts and special circumstances. The only merit which the appeal which deserves at the instance of State, is dismissal.Accordingly, the appeal is dismissed. It is reported to us that the accused was released on bail during the pendency of the appeal with effect from 11.12.1992,though initially, he could not avail therr benefit of the order of the court. Consequently, the bail bonds shall stand cancelled forthwith, if he is not required in any other case.

Before parting, we may mention that we were provided able assistance by learned advocate Mr. Dave who was appointed to render legal aid to the accused.

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